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Civil Service Appointments and Promotions

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COURT OF APPEALS

City of New York v. New York State Div. of Human Rights[1] (decided October 19,1999)

Appeal was brought as of right by plaintiff, City of New York, in regard to whether subdivision 3 of Civil Service Law § 56, added by amendment in 1994, is constitutional under the State constitution.[2] The applicable state constitutional claim in this matter falls under the civil service merit and fitness clause of the State constitution.[3] The Court of Appeals modified the judgment of the Appellate Division, reversing the lower court's holding insofar as it supports the legislative creation of a new right derived from a special eligibility list coupled with retroactive seniority upon selection from that list.[4] The court's rationale was based on the State Constitution's safeguard to prevent the transference of an individual from a legally expired list to a legislatively created

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[1] 93 N.Y.2d 768, 720 N.E.2d 870, 698 N.Y.S.2d 594 (1999).

[2] N.Y. CIV. SERV. LAW § 56 (McKinney 1999). Subdivision 3 of the Civil Service Law § 56 was amended in 1994 to provide in pertinent part:

> [t]he name of any applicant or eligible whose disqualification has been reversed or whose rank order on an eligible list has been adjusted through administrative or judicial action or proceeding shall be placed on an eligible list for a period of time equal to the period of disqualification .... If an eligible list expires prior to the expiration of such period of restoration, the name of the applicant or eligible shall be placed on a special eligible list, which shall have a duration equal to the remainder of the period of restoration. An applicant or eligible whose disqualification has been reversed or whose rank order has been adjusted subsequent to the expiration of an eligible list shall be placed on a special eligible list for a length of time equal to the restored period of time not to exceed a maximum of one year.

Id.

[3] N.Y. CONST. art. V, § 6. This section provides in pertinent part:

> Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive....

Id.

[4] *New York State Div. of Human Rights*, 93 N.Y.2d at 771, 720 N.E.2d at 871, 698 N.Y.S.2d at 595.

eligible list that may then be in conflict with individuals on a regular and valid eligible list.[5]

This case arose when New York City refused to add Mr. Eddie Ricks to a civil service eligible list after he took and passed a civil service exam in 1973 for an opportunity to work in the sanitation department.[6] In 1983, Mr. Ricks was found medically disqualified due to the standards of the work he sought, so he filed a complaint with the defendant, New York State Division of Human Rights (hereinafter Division of Human Rights), alleging racial discrimination and later amended to include his medical condition.[7]

In 1986, the Department of Personnel revised its medical standards, eliminating the condition that had disqualified Mr. Ricks, thus on re-examination in 1987 he was found qualified.[8] However, this new qualification was meaningless because the eligibility list containing Mr. Ricks' name had expired by operation of law in 1986.[9] The State Division of Human Rights proceeded with a hearing, which resulted in Mr. Ricks' recovery for compensatory damages, based on disability discrimination in 1989.[10] Notwithstanding this award, in 1996 the Division of Human Rights vacated the 1986 action because the Commissioner involved in the final determination had appeared as counsel for the Division of Human Rights in this matter.[11] Such duel participation in the proceedings required de novo review and a new order by an unbiased arbiter.[12] The Division of Human Rights vacated the previous order, proceeded with a de novo review of the record, and in 1997 issued a new order reiterating the original finding, but also retroactively applying subdivision 3 of the Civil Service Law § 56,[13] which was enacted in 1994.[14] This application called for

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *New York State Div. of Human Rights*, 93 N.Y.2d at 772, 720 N.E.2d at 872, 698 N.Y.S.2d at 595.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See supra* note 2 and accompanying text.

Mr. Ricks to be "placed on a special eligible list for one year, awarded for retroactive seniority if selected, in the event appointment and awarded backpay offset by actual earnings."[15]

The City of New York brought an article 78[16] action against the Division of Human Rights, and the Supreme Court, Appellate Division, altered the determination by vacating the backpay award and reducing the damages.[17] However, the court upheld the constitutionality of the 1994 Civil Service Law amendment[18] and approved its retroactive application through the retroactive creation of a special eligible list and retroactive seniority.[19]

The City of New York appealed this judgment on constitutional grounds, arguing that the amendment violated the merit and fitness provisions of the State Constitution.[20] The City legislature argued that one could not provide opportunity for consideration of those individuals whose entitlement ended as a matter of law.[21] On the other hand, the Division of Human Rights countered that the administrative process is a legislative creation, claiming that "the

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[14] *New York State Div. of Human Rights*, 93 N.Y.2d at 772, 720 N.E.2d at 872, 698 N.Y.S.2d at 595.

[15] *Id.*

[16] ARTICLE 78, § 7801, Nature of Proceeding, states in pertinent part:

> Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article.
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> *Id.*

[17] City of New York v. New York Div. of Human Rights, 250 A.D.2d 273, 279, 682 N.Y.S.2d 387, 390 (1st Dep't 1998).

[18] N.Y. CIV. SERV. LAW § 56 (McKinney 1999). *See supra* note 2 and accompanying text.

[19] *New York Div. of Human Rights*, 250 A.D.2d at 277, 682 N.Y.S.2d at 389. The court reasoned that the legislature recognized that there were long delays in the adjudication of claims, and often the applicants would find that they were eligible to compete for a permanent civil service position, but that the eligible list is close to expiration or has expired. *Id.*

[20] *New York State Div. of Human Rights*, 93 N.Y.2d at 771, 720 N.E.2d at 871, 698 N.Y.S.2d at 595.

[21] *New York State Div. of Human Rights*, 93 N.Y.2d at 773, 720 N.E.2d at 871, 698 N.Y.S.2d at 596.

legislature may proclaim the special eligible list to redress the inequity of disqualification of otherwise qualified candidates - those found and declared illegally excluded from consideration from their opportunities to be considered at a later time."[22]

The court began its analysis by stating that there is no disagreement over the fact that the Merit and Fitness Clause of the Constitution is not the origin of the eligibility lists, and that the legislature indeed has this power.[23] However, the court citing *Hurley v. Board of Educ. of New York*,[24] noted that the Constitution limits the legislature's discretion in the enforcement of this Constitutional clause.[25] The Court further identified the problem with both the case at bar, and the 1994 amendment to the Civil Service Law § 56 as being that they go beyond mere "enforcement."[26] In addition to this impermissible application, the retroactive application of the law is also a legitimate basis for invalidation.[27]

The Court of Appeals in *Deas v. Levitt*,[28] declared that selection and appointment of an individual from a legally valid list that expired specifically violates Art. V, sect. 6 of the State Constitution.[29] The legislature therefore lacks the authority to pass a law that is directly violative of this constitutional principal.[30] Thus, pursuant to the Constitution, the eligible list contrived by this Court may be available only when the statutory life of the list has not previously been legally active and then has expired.[31] Here, the Division of Human Rights argued that in the past there

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[22] *Id.*

[23] *Id.*

[24] 270 N.Y. 275, 279, 200 N.E. 818, 820 (1936).

[25] *New York State Div. of Human Rights*, 93 N.Y.2d at 774, 720 N.E.2d at 873, 698 N.Y.S.2d at 596.

[26] *Id.*

[27] *Id.*

[28] 73 N.Y.2d 525, 539 N.E.2d 1086, 541 N.Y.S.2d 958 (1989).

[29] *See supra* note 2 and accompanying text..

[30] *New York State Div. of Human Rights*, 93 N.Y.2d at 774, 720 N.E.2d at 873, 698 N.Y.S.2d at 597.

[31] *Id.* at 775, 720 N.E.2d at 874, 698 N.Y.S.2d at 597 (referring to the special eligible list created by this court in Matter of Mena v. D'Ambrose, 44 N.Y.2d 428, 377 N.E.2d 466, 406 N.Y.S.2d 22 (1978)).

was a legislative attempt to extend an expired list, instead of creating a special eligible list, due to a wrongful exclusion of an individual from the eligible list.[32] This however, the Court noted does not hold true in the case at bar because no appointment can be made from a legally defunct list – neither the courts nor the legislature can allow an applicant's eligibility, when it is derived from an expired list which would be impermissible in light of the State's Constitutional protection.[33]

The Court diffused the dissenting opinion's argument that the case at bar was similar to the facts in the *Deas* case, which involved a similar civil service disqualification issue.[34] However, the Court stated that the crucial factor for resolving this issue is accomplished by focusing on the nature of the claim.[35] Consequently, the dissent was not credible in its argument because the individual in the case under which they sought support had to challenge the validity of the list itself, rather than assert that he or she was wrongly ruled ineligible for the job.[36] Accordingly, the *Deas* case that was cited by the dissent for support, in comparison to the case at bar, is fundamentally different from the facts presented in this case and the legislative amendment involved.[37] The Court of Appeals reasoned that the *Deas* court placed emphasis on the type of claim sought in resolving the challenge, rather than finding that the applicant for a civil service position

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[32] *Id.* at 775, 720 N.E.2d at 874, 698 N.Y.S.2d at 598 (referring to the action the court took in Hurley v. Board of Educ. of City of N.Y., 270 N.Y. 275, 200 N.E. 818 (1936), where an extension of the list was employed).

[33] *Id.* at 776, 720 N.E.2d at 874, 698 N.Y.S.2d at 598.

[34] *Id.* at 774, 720 N.E.2d at 873, 698 N.Y.S.2d at 597.

[35] *See generally Deas*, 73 N.Y.2d 525, 539 N.E.2d 1086, 541 N.Y.S.2d 958 (1989). The *Deas* court held that the petitioner who took a test for a civil service position and scored third highest, but was delayed in his certification due to a medical disqalifier, must bring a proceeding before the list expires. The court noted that the petitioner did not claim that the list was contrary to the merit and fitness requirements of the State Constitution, Art. 6, § 6. Therefore, no relief was granted. *Id.*

[36] *Id.* at 775, 720 N.E.2d at 874, 698 N.Y.S.2d at 597

[37] *Id.*

was wrongly ruled ineligible.[38] Furthermore, the applicant, under the merit and fitness requirements, must challenge the validity of the list itself.[39] The Court stated, "[h]ere, the candidate for consideration rises like a phoenix from the ashes of a once valid list that burned out legally."[40]

Furthermore, the Court reasoned that the 1994 amendment to the Civil Service Law substantially alters the narrow "Mena remedy" to create special eligible lists available to those improperly disqualified applicants.[41] The dissent drew a comparison from a case where the eligibility list was not technically in legal existence, so that the list could not expire and then come back into legal actuality as a constitutionally prohibited new source.[42] Moreover, the conflicting appointment that could occur from an expired, but reincarnated list, "is the crux of the 'merit and fitness' deficiency under the challenged statutory amendment," which the dissent fails to recognize.[43]

It is important to note that in a comparison of state and federal law in this area, there is no comparable federal constitutional provision, issue, and likening that could be drawn from the Federal Constitution as compared to the New York State Constitution. Accordingly, the retroactive application of the Civil Service Law amendment, which created a new right for those individuals on the eligibility list that were no longer eligible as a matter of law is

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[38] *Id.*

[39] *Id.*

[40] *New York State Div. of Human Rights*, 93 N.Y.2d at 775, 720 N.E.2d at 874, 698 N.Y.S.2d at 597.

[41] *Id.* (referring to "Mena remedy" from Matter of Mena v. D'Ambrose, 44 N.Y.2d 428, 377 N.E.2d 466, 406 N.Y.S.2d 22 (1978), which allowed possible appointment from a list that had "technically not yet come to life." Therefore, the list could not be reconstituted after its expiration as a Constitutionally prohibited source that conflicts with a potential assignment of persons from a regularly promulgated list.). *Id.*

[42] *Id.*

[43] *Id.*, 93 N.Y.2d at 775, 720 N.E.2d at 874, 698 N.Y.S.2d at 597 (referring to N.Y. CONST. art. V, § 6.).

unconstitutional due to its conflicting nature with the State Constitution's "merit and fitness" provisions.[44]

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[44] N.Y. CONST. art. V, § 6.